SAO 2/2012

BEFORE

THE HON’BLE MR. JUSTICE S. TALAPATRA

Heard Mr. S.P. Roy, learned counsel appearing for the appellant as well as Mr. G. Bordoloi, learned counsel for the sole respondent.

This is an appeal filed under Order 43 Rule 1(U) read with Section 151 of C.P.C against the judgment and order dated 31.07.2010 passed by the Civil Judge No.2, Kamrup, Guwahati in Title Appeal No.29 of 2008 setting aside the judgment and decree of the trial Court and remanding the suit for fresh disposal.

Mr. S.P. Roy, learned counsel appearing for the appellant submits that there was a former suit between the same parties being Title Suit No.92 of 1995 which was decreed in favour of the petitioner and the present respondents preferred an appeal against the judgment and decree dated 09.12.1998 as passed in the said suit, being RFA 23/1999, in this Court and the said appeal was dismissed by the judgment and decree dated 15.03.2000. Thereafter, the petitioner put said decree in execution which proceeding is still pending. Meanwhile the respondent No.2 again filed a fresh suit for declaration of the right, title and interest over the decreetal land being T.S. No. 600/2006.

The petitioner on receipt of the summon from the Court submitted the Written Statement categorically holding that the fresh suit is barred in view of the pending execution case and any dispute regarding right, title and interest of the decreetal land can only be raised in an appreciation under Order XXI Rule 97/99 read with Section 101 of the C.P.C and Section 47 of the C.P.C.

Accordingly, the Issue No.2 was framed as whether the suit is maintainable in its present form?

Ultimately the trial Court dismissed the suit by the judgment and decree dated 31.05.2008 passed in T.S. No.600/2006.

Aggrieved by the said judgment and decree of dismissal the Title Appeal No.29/2008 was preferred by the respondent No.1.

The Appellate Court after hearing the parties at length set aside the judgment and decree and remanded back the suit for re-adjudication. The basis of such finding and direction is available at Para-15 of the impugned judgment and decree. On appreciation of the said basis, it appears that trial Court has already framed broader issue on maintainability of the suit, which embraces the issue as suggested by the Appellate Court. Therefore, this cannot be a ground for remanding the suit for fresh adjudication on setting aside the impugned judgment and decree. The Appellate Court is within its competence to decide that issue, as the issue requires determination on appreciation of the evidence already led.

In view of this, the impugned judgment and decree of the Appellate Court dated 31.07.2010 as passed in Title Appeal No.29/2008 is hereby set aside. The first Appellate Court, the Civil Judge No.2, Kamrup, Guwahati is directed to dispose the appeal keeping in mind that Issue No.2 has embraced the issue that has been indicated in Para-15 of the impugned judgment and decree and for that purpose on appearance of the parties as directed, the Civil Judge No.2, Kamrup, Guwahati shall fix a date for hearing.

With this observation and direction this appeal stands allowed.

There shall be no order as to costs.

All the parties shall appear before the Court of Civil Judge No.2, Kamrup, Guwahati on 3rd September, 2012.